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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

In re:

NATHAN N. POWELL,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether a lawyer disciplinary rule promulgated by a state supreme court offends Equal Protection under the Fourteenth Amendment in creating an unreasonable discriminatory classification in prohibiting "giving or lending anything of value to a judge", but excepting therefrom contributions to a judge's election-campaign fund?

2. Whether Due Process and Equal Protection under the Fourteenth Amendment were violated in disbarring a lawyer who could not "be deemed to have been on notice that the Court . . . could condemn the conduct for which he was disbarred"[1], where the disciplinary rule under which he was disbarred was impermissibly vague, where the State Supreme Court contemporaneously absolved certain "outstanding" lawyers for admitted infractions of the rule because the Court had not theretofore interpreted the rule, yet disbarred Petitioner, for an offense antedating the formal adoption of the rule and its later interpretation by the Court?

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[1] From *In re Ruffalo*, 390 U.S. 544, 554 (1968), 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

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REFERENCE TO REPORTS

The opinion of the Supreme Court of Illinois is reported at 126 Ill. 2d 15, 533 N.E. 2d 831 (1989), and is appended hereto as App. A, 1a-12a. The order of the Supreme Court of Illinois denying rehearing is appended hereto as App. B, 1b. The order of the Supreme Court of Illinois staying mandate is appended hereto as App. C, 1c.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on December 15, 1988. The petition for rehearing was denied by that court on January 30, 1989. This PETITION FOR WRIT OF CERTIORARI is timely filed within 90 days of the latter date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

RULES, STATUTES AND CONSTITUTION INVOLVED

Rule 7-110 (a) of the Illinois Code of Professional Responsibility, 107 Ill. 2d R. 1-01, et seq., Ill. Rev. Stats. chap. 110A, Can. 7 provides in pertinent part:

> (a) A lawyer shall not give or lend anything of value to a judge . . . except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

U.S.C. Const. Amendment XIV, Sec. 1:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This was an attorney disciplinary proceeding arising from a federal criminal prosecution of a former state court judge, Reginald J. Holzer (hereafter "Holzer") who, along with several other judges and attorneys (not including Petitioner) was convicted of mail fraud and racketeering.

In the wake of the scandal known as Operation Greylord[2] Petitioner was charged by the Administrator of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois with violating a number of disciplinary rules of the Illinois Code of Professional Responsibility, including Rule

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[2] See Touhy and Warren, GREYLORD: JUSTICE CHICAGO STYLE (G.P. Putnam Sons, 1988).

7-110 (a) (quoted supra).[3]

In substance Petitioner was accused of helping Holzer, before whom Petitioner's client had a case pending, to obtain a loan from a bank (of which Petitioner was General Counsel) by arranging for the client to post collateral for the loan.

The transaction took place on March 19, 1979. Thereafter Holzer ruled favorably for Petitioner's client in a non-final order. The disciplinary rules under which Petitioner was charged were formally adopted by the Illinois Supreme Court effective July 1, 1980. The charges against Petitioner were lodged in 1986 when Petitioner was 73 years old and had been in practice since 1934 with an unblemished record.

Long prior to the episode Petitioner had been personally acquainted with Holzer when Holzer practiced law in the same office building. In his long career Petitioner had only tried 20 cases, and except for the case pending before Holzer, had never had any litigation before the judge prior to or after the bank loan.

Petitioner testified that he was shocked and upset at Holzer's request for help in obtaining the bank loan, that he was disturbed because he felt that Holzer was "trying to victimize me" but that he felt compassion for Holzer's allegedly desperate economic plight.

As to the major charge by the Administrator, the Hearing Panel concluded that Petitioner was not guilty of giving or lending a thing of value to the judge in violation of Rule 7-110(a). The Panel, however, did find Petitioner guilty of other infractions

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[3] Under the Attorney Disciplinary System promulgated by the Supreme Court of Illinois (Ill. Rev. Stats, chap. 110A, pars. 751, et seq.) a four-level procedure is established. An Inquiry Board (acting as a "grand jury") may vote a formal complaint which then is the subject of responsive pleadings, discovery and an evidentiary hearing by a Hearing Board (trial) and appellate review by a Review Board. The Boards are composed of lawyers whose determinations to impose discipline are only recommendations to the Supreme Court which alone orders the discipline. *In re Harris*, 93 Ill. 2d 285, 443 N.E. 2d 557 (1962). See comprehensive discussion of the System under **Historical and Practice Notes,** Smith-Hurd Ill. Ann. Stats. chap. 110A, pp. 611-615.

of the disciplinary rules, notwithstanding that the offenses under those rules would be derivative only if Petitioner were guilty of breaching the prohibition against loans or gifts to judges. The Hearing Panel recommended disbarment. The Review Board concurred with the recommended discipline although misapprehending that the Hearing Panel (as trier of fact) had found Petitioner not guilty of "giving or lending anything of value to a judge". Accepting the recommendation of disbarment, the Supreme Court of Illinois noted:

> The Review Board, in reciting the Hearing Board's decision, mistakenly stated that [Powell] had been guilty of violating DR 7-110(A). The Review Board stated: '[Powell's] actions were calculated, wrong and cancerous to our system of justice. They resulted in the outright purchase of a judicial ruling akin to Esau before him, he sold his professional birthright for a bowl of Judge Holzer's gruel. His conduct is shocking and we concur in the recommendation of the Hearing Panel that [Powell] be disbarred.' (126 Ill.2d at 24, App. A., 5a).

One member of the Review Board, however, while agreeing with the finding of misconduct, felt that Petitioner should be suspended for only three years. The Illinois high court concluded that having his client post collateral for Holzer to obtain the $10,000 bank loan Petitioner circumvented Rule 7-110(a) prohibiting gifts or loans to judges, and disbarred Petitioner. The Court, however, found that Petitioner had not violated the other rules and dismissed those charges. (126 Ill. 2d at 28-30, App. A. 7a-9a).

The Illinois court denied Petitioner's request for rehearing (App. B, 1b) but stayed the Court's mandate pending appeal to this Court. (App. C, 1c).

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE PRESENTED AND PRESERVED

In his appeal to the Illinois Supreme Court from the Review Board's recommendation of disbarment, Petitioner argued that disbarment was unduly harsh and inconsistent with more lenient

disciplines recommended by the Review Board in other cases involving more egregious conduct under a rule not theretofore interpreted by the Court. Petitioner pointed out that he, like other attorneys charged with violation of Rule 7-110(a) following Operation Greylord, had not been aware of the existence of the Rule.

Petitioner also pointed out that his alleged misconduct occurred in March 1979–more than a year prior to the formal adoption by the Court of the Illinois State Bar Association Code of Professional Responsibility effective July 1, 1980, and long prior to the Court's interpretation of the Rule in 1988.[4]

In his briefs before the Illinois Supreme Court, Petitioner argued that Rule 7-110(a) was flawed and unconstitutional in creating an unreasonable classification, offensive to equal protection, with respect to loans and gifts to judges on the one hand and campaign contributions on the other.

In its decision the Illinos Supreme Court rejected Petitioner's argument of inconsistent disciplines. It purported to distinguish the circumstances of Petitioner's help in facilitating the bank loan for Holzer, from the circumstances under which the Court exonerated other attorneys, notwithstanding their violations of Rule 7-110(a) in making gifts or loans to Holzer and to other judges. See: *In re Corboy,* 124 Ill. 2d 29, 529 N.E. 2d 689 (1988); and *In re Ketchum*, 124 Ill. 2d 50, 528 N.E. 2d 689 (1988), and *In re Jones*, 125 Ill. 2d 371, 533 N.E. 2d 239, (1989) which cases are discussed post.

The Illinois Supreme Court alos rejected Petitioner's constitutional claim that Rule 7-110(a) offends Equal Protection on the grounds that Petitioner "lacked standing" to raise such a claim. (126 Ill. 2d 15 at 25-27, App. A., 6a-7a)

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[4] Prior to the formal adoption of the Code, the Illinois Court in numerous disciplinary cases, referred to the Illinois State Bar Code as a "guide in disposing of such cases". No case, however, interpreted Rule 7-110(a). Petitioner presumed that the Court deemed it necessary formally to adopt the ISBA Code to make the lawyer population conscious of the existence of the Code, and the obligations of every lawyer to familiarize himself with its provisions and duty of strict adherence.

Powell's Petition for Rehearing renewed his Equal Protection claim and raised the issue of Due Process. He thereby preserved the issues which he presents in this Petition for Certiorari.

ARGUMENT

I.

THE DISCIPLINARY RULE UNDER WHICH PETITIONER WAS DISBARRED OFFENDS THE EQUAL PROTECTION CLAUSE CREATING AN UNREASONABLE AND DISCRIMINATORY CLASSIFICATION WITH RESPECT TO "LOANS AND GIFTS" TO JUDGES ON THE ONE HAND, AND "CAMPAIGN CONTRIBUTIONS" TO JUDGES ON THE OTHER.

A. The dichotomy between loans/gifts and campaign contributions to judges is irrational, invidious and infringes upon Petitioner's fundamental right to practice law.

The case at bar involves construction of a state court rule regulating professional conduct and whether that court has been evenhanded and consistent in the enforcement of that rule. In *Koenigsberg* v. *State Bar of California*, 366 U.S. 36, 45, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961) this Court held that state court rules in respect to professional conduct are to be treated in the same manner as statutes in determining whether there has been a violation of Due Process or Equal Protection.

At the relevant time of Petitioner's alleged misconduct the full text of Rule 7-110(a) was:

> A lawyer shall not give or lend a thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office. (107 Ill. 2d R. 1-101, et seq.) (Ill. Rev. Stats. chap. 110A, Can. 7).

The foregoing rule was modeled on DR 7110(A) of the ABA Code of Professional Responsibility which provides:

> A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except as

> permitted under Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

The *ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY* published by the American Bar Foundation (1979) notes that the original tentative draft merely provided that:

> A lawyer shall not give or lend anything of value to a judge, an official, or an employee of a tribunal.

and that DR 7-110(A) was amended to make an exception from the foregoing proscription to allow a lawyer to contribute "to the campaign fund of a candidate for a judicial office". (p. 376).

While there are provisions in the Code of Judicial Conduct which are designed to screen the identity of campaign contributors to a judicial candidate, realistically a judicial candidate does come to know his campaign benefactor. Furthermore, it is also commonplace that a candidate for judicial office (as a candidate for any political office) may utilize surplus funds as personal income provided he reports such on his income tax return. In that sense, a campaign contribution to a judge seeking re-election or retention is certainly a "thing of value" in a double sense.

The *ANNOTATED CODE* makes the following comment with respect to the Rule:

> The provisions of DR 7-110 are designed to safeguard the fairness and impartiality of the tribunal and the orderliness of its procedures. Thus, EC 7-36 encourages lawyers . . . to avoid 'undue solicitude' or any other conduct that is calculated to gain special consideration. (p. 376).

The campaign-contribution exception to the Rule presents an anomaly and an offense to constitutional Equal Protection. A lawyer's $5.00 Christmas gift to a clerk of the court for courteous service during the year is a literal breach of 7-110(a). It exposes the attorney to discipline–even though such modest gift would

hardly promote "undue solicitude" nor be calculated "to gain special consideration" for the lawyer. A $50.00 loan to a judge, even though bona fide, and without thought of special favor, is ipso facto a violation of the Rule. On the other hand, a $5,000 "campaign contribution to a judge" is given ethical sanction, even though the contribution surely will strain the judge's impartiality to the contributor. The initial civic purpose will be vitiated when the jurist legally taps his election-campaign fund for personal income.

In these circumstances, 7-110(a) is asymmetrical and represents an unconstitutional dichotomy. Either the "campaign contribution" exception should be carefully scrutinized as discriminatory and violative of Equal Protection, or the rule should be given an interpretation which takes into account the mental state or purpose accompanying a gift or a loan to a judge–which motivation the Illinois Supreme Court has rejected as irrelevant to a violation of the rule. (See discussion post).

The ABA's justification for accepting judicial campaign contributions is that lawyers should have the same rights and privileges as other civic-minded citizens to participate in the democratic political process by financial assistance to candidates of their choice. *Pari ratione*, the foregoing justification would not preclude loans or gifts by lawyers to judges because gifts or loans, absent a venal or improper motive, are not illegal or *malum per se*. If they can be made to judges by nonlawyers, why not by lawyers?

But, if gifts or loans by lawyers to judges are condemned and disciplinable regardless of motive because an unconditional ban eliminates "even the appearance of improper influence" (*In re Corboy*, 124 Ill. 2d 29, at 38), the exception for campaign contributions cannot hold constitutional water. If lawyers are held to a higher standard than laymen as to the first category, why should the second category be an exception?

B. Petitioner has standing to raise his claim that Equal Protection is abridged by applying Rule 7-110(a) to his disbarment.

The Illinois Supreme Court rejected Petitioner's constitutional argument in the following terms:

> Because [Petitioner's] actions in arranging the loan for Holzer *were calculated to have an effect on the case pending before the judge, we conclude [Petitioner] lacks standing to raise his constitutional claim* to raise an equal protection argument. The party must be a member of the class against whom the rule allegedly discriminates. [citation]. Respondent, however, does not belong to the group which he contends DR 7-110(a) discriminates against, namely, those attorneys who make personal gifts to judges with no improper motive. Because [Petitioner] *has no standing to raise the constitutional claim*, we have no reason to address the argument. (126 Ill. 2d at 27). (App. A, 7a). (Emphasis added).

Petitioner respectfully submits that the foregoing analysis by the Illinois high court of his constitutional claim is erroneous and untenable. Indeed, it sidesteps the substantial constitutional problem involving Rule 7-110(a).

1. Given that the Illinois court's interpretation of the rule in other disciplinary cases discussed post, dispenses with motive or intent as an element of a violation, it matters not that Petitioner's conduct was "calculated" to influence a judge's ruling. Regardless of his alleged motive, Petitioner is still a member of the class who gave or loaned a thing of value to a judge and is disciplined with the extreme sanction of disbarment for violating the rule. Therefore, pre-eminently he does have standing to challenge the constitutionality of the rule under which he is condemned.

2. The irrational and arbitrary classification which Petitioner challenges and claims to infringe Equal Protection, is between a lawyer who gives or lends anything of value to a judge (the unprotected class) and a lawyer who makes a campaign

contribution to a judge, also a thing of value, (the protected class). If a literal *per se* construction is applied to the first clause in Rule 7-110(a), it should also apply to the purported exception in the second clause. Conversely, the justification which sanctions campaign contributions to a judge could theoretically apply as well to a gift or loan (absent a venal motive), because a lawyer would be exercising the same rights or privileges of non-lawyers.

3. Since the Illinois Supreme Court has exonerated lawyers who have made "personal gifts to judges with no improper motive" (*In re Corboy*, supra; *In re Jones*, supra) those lawyers would have no reason to invoke the Equal Protection Clause or to challenge the constitutionality of Rule 7-110(a). Who then, but lawyers who are found guilty of violating the Rule, such as Petitioner, have standing to make an Equal Protection claim?

4. Petitioner's constitutional contention is that it is unreasonable to exempt campaign contributions to a judge for the same reason the court in the *Corboy* cases applied the prophylactic test:

> We agree. . . with the Administrator that application of the rule does not depend upon the subjective state of the attorney's mind. If it did, the prophylactic effect of the Rule would be lost. Since only attorney gift[s] or loan[s] which were intended to influence or may tend to influence a judge *would be proscribed. . . we cannot accept such an interpretation. Attorney gifts or loans to judges even if well-intentioned, are simply too susceptible to abuse and too prone to creating an appearance of impropriety. (124 Ill. 2d 39) (Emphasis added).*

As noted above, the identical rationale for prohibiting gifts or loans to judges can be said of campaign contributions to judges. The unreasonableness of the campaign contribution exceptions is vulnerable to the instant Equal Protection claim regardless of the "subjective state of the attorney's mind".

5. The premise of the Illinois high court's conclusion that Petitioner "has no standing" to make his Equal Protection claim rests upon the dubious and debatable finding that he had a venal motive in arranging for his client to post collateral for Holzer's

bank loan.[5]

C. A state cannot preclude a person from the practice of law for reasons which breach the Equal Protection clause of the Fourteenth Amendment.

In *Wilner* v. *Committee on Character*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), this Court ruled:

> 'A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene Due Process or Equal Protection clauses of the Fourteenth Amendment', citing *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239.

The right to practice law is a fundamental right which can be abridged by an arbitrary or irrational infringement upon Due Process or Equal Protection. In *Baird* v. *State Bar*, 101 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971), this Court ruled:

> The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. (401 U.S. at 8).

Petitioner's disbarment is an abridgment of his fundamental right and results from the arbitrary and irrational classification of the rule under which he is condemned, as well as an invidious and disparate enforcement of the rule. Recognition of rights under the Equal Protection and Due Process provisions of the federal (as well as the Illinois state constitution)[6] are reflected in a number of seminal cases by this Court: *Spevack* v. *Klein*, 385 U.S. 511,

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[5] The Hearing Panel, as trier of fact, found Petitioner *not guilty* of violating Rule 7-110(a). Respondent, although feeling victimized by Holzer's request, helped Holzer because of his "foremost concern that [he] had to help the judge" (126 Ill. 2d at 22, App. A, 3a) was not less well-intentioned than the lawyer in *In re Jones*, 125 Ill. 2d 371 (1989) who, having a personal matter pending before Holzer had loaned the judge $15,000, never repaid, but who was absolved of any violation of the rule in question.

[6] (Ill. Const. Art. I, sec. 2, Ill. Rev. Stats., Vol. I, Illinois State Bar Assn. Ed., p. 13).

87 S. Ct. 625, 17 L. Ed. 574 (1967); *Wilner* v. *Committee on Character,* supra; *In re Ruffalo*, supra; *Cohen* v. *Hurley*, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1960); *Koenigsberg* v. *State Bar of California*, supra.

II.

DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED IN DISBARRING PETITIONER WHO WAS IGNORANT OF THE RULE UNDER WHICH HE WAS DISBARRED, WHICH RULE HAD NOT BEEN FORMALLY ADOPTED NOR INTERPRETED IN THE SUPREME COURT OF THE STATE AT THE TIME OF HIS OFFENSE AND WHERE OTHER LAWYERS CHARGED WITH VIOLATING THE SAME RULE WERE ABSOLVED.

A. The Illinois court has imposed inconsistent and disparate disciplines against lawyers charged with violation of Rule 7-110(a).

Preceding by a few months the instant disciplinary opinion, the Supreme Court of Illinois issued its first interpretation of Rule 7-110(a) in a series of consolidated cases, *In, re Corboy, et al.*, 124 Ill. 2d 29, 528 N.E. 2d 689 (June 1988). In *Corboy* a number of lawyers, described by the Court as "outstanding", were charged with violating the rule by reason of having made gifts or loans to Judge Richard LeFevour, another judge involved in the Operation Greylord scandal. The lawyers were said to be unaware of the rule.

Four of the attorneys in *Corboy* had paid $1,000 each to Judge LeFevour at the solicitation of another attorney named Walter Ketchum[7] for the purpose of settling a hospital bill incurred by the Judge's mother. None of the four attorneys had practiced before the judge, and each had a limited contact in the First Municipal District of the Circuit Court where Judge LeFevour presided. With respect to the other two attorneys involved in

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[7] Ketchum was disciplined in a companion opinion, *In re Ketchum*, 124 Ill. 2d 50, 518 N.E. 2d 689 (1988).

Corboy, "a different factual picture [was] presented." (124 Ill. 2d at 46) in that each of the two had cases pending in Judge LeFevour's district and had made personal loans to him of up to $5,000.

Declaring that Rule 7-110(a) was a "prophylactic rule", the court found that all six of the attorneys involved in *Corboy* were *guilty* of its violation, but found it inappropriate to impose sanctions and discharged all six of the lawyers. (124 Ill. 2d at 46, 50). Contemporaneously with the instant decision involving Powell, the Illinois court decided *In re Jones*, 125 Ill. 2d 371 (1989) where the attorney was charged with making a $15,000 undocumented loan to Judge Holzer, which loan was never repaid. Notwithstanding that the attorney had a "personal" case pending before Holzer, the Court exonerated Jones.

Until the court's decision in *In re Corboy* (decided June 1988), Rule 7-110(a) had never been presented for interpretation by the Illinois Supreme Court. In the related case of *In re Ketchum*, supra, the court reaffirming its position that the Rule was "prophylactic", and therefore to be strictly applied, said:

> In . . . [Corboy] we held that evidence of dishonest intent and motive is not necessary to justify imposition of discipline. [citation]. We further held that evidence showing a lack of dishonest intent is usually only appropriate to determine the nature and severity of the sanctions imposed. [citation].

In the case at bar, the Illinois court again emphasized that the state of mind of the giver or lender was irrelevant to application of the rule since the giving or lending of a thing of value actually occurred, said:

> In *Corboy* we concluded that an attorney's motives in making a gift or loan to a judge *are irrelevant in determining whether he is guilty of* misconduct. since 'even if well-intentioned [the gifts or loans] are simply too susceptible to abuse and too prone to creating an appearance of impropriety'. (125 Ill. 2d at 27, quoting *Corboy*, 124 Ill. 2d, 38).

Notwithstanding the Illinois court's conclusion that the lawyers involved in *Corboy* and *Jones* had literally violated 7-110(a), the court nevertheless absolved those lawyers with the rationale:

> . . . We hold that we cannot censure any of these respondents for their conduct. *They acted without the guidance of precedent or unsettled opinion, and there was, apparently, considerable belief among members of the bar, that they had acted properly.* (124 Ill. 2d at 45) (Emphasis added).

With reference to the other respondents in *Corboy*–who made loans to Judge LeFevour in amounts ranging from $2,000 to $5,000--the Illinois court dismissed those charges with the justification that the respondents there did not have the guidance of the court's interpretation of a virgin rule and hence that the lawyers had sailed "in uncharted waters". The court noted that the lawyers charged:

> . . . were not aware of the prohibition of Rule 7-110(a) and certainly could not have been aware of the construction that we have placed *for the first time,* on that rule in this opinion. (124 Ill. 2d at 49) (Emphasis added).

Like the respondents in *Corboy*, supra, the court in *Jones* expressly noted that Jones had indeed violated Rule 7-110(a). In contrast to *Corboy* the court remarked:

> The relationship of the parties, coupled with the size of the loan [$15,000] might suggest that Respondent *was not* motivated entirely by charity and compassion for the financially strapped Holzer. (125 Ill. 2d at 380). (Emphasis added).

Nevertheless, the Illinois court, while holding in other cases, including petitioner's, that an attorney's motive in making a gift or a loan to a judge is irrelevant on the issue of a violation of the rule, exonerated Jones.

In a spate of other disciplinary cases arising from Operation Greylord, the Illinois court imposed a draconian sanction of

disbarment or suspension for infractions of the same rule, even though the lawyers involved, like the lawyers in *Corboy* sailed in "uncharted waters" and without an authoritative interpretation of the rule:

> *In re D'Angelo*, 126 Ill. 2d 45, 533 N.E. 2d 861 (respondent disbarred for arranging for Avis car rentals in 1982-1984 for several judges, including Judge LeFevour);
>
> *In re Heller*, 126 Ill. 2d 94, 533 N.E. 2d 824 (1988) (two attorneys disbarred for repeated procurement of bank loans for Holzer over a seven-year period);
>
> *In re Rothenberg*, 127 Ill. 2d 139, (1989) (a 76 year old attorney suspended for one year for making loans totaling $1,700 to Judge Holzer during a six-year period, notwithstanding the relationship between Holzer and the attorney and antedated by many years Holzer becoming a judge and Holzer being a one-time member of respondent's law firm);
>
> *In re Karzov*, 126 Ill. 2d 33, 533 N.E. 2d 856 (1989) (attorney suspended for eighteen months for making a $1,000 loan to Holzer under extortionate circumstances. See Petition for Certiorari pending in this Court).

B. Petitioner was entitled to the same exculpatory consideration given to the lawyers in *Corboy* and *Jones* who were exonerated notwithstanding that they made prohibited loans to a judge, because there was no "guiding precedent" for their conduct.

In common with the lawyers in *Corboy* and *Jones*, Petitioner in the case at bar, like they, "acted without the guidance of precedent or settled opinion" and in the same environment of uncertainty and debatability as to the interpretation of Rule 7-110 (a). Like they, because "not aware of the prohibition [of the rule] at the time of his conduct and certainly "could not have been aware of the construction that [the Supreme Court] . . . for the first time placed on that Rule" in the *Corboy* opinion. (124 Ill. 2d 49).

In short, petitioner, like the respondents in *Corboy* and *Jones* "sailed in uncharted waters".

In the case at bar Petitioner's conduct was not more--probably less--blameworthy than the respondent in *Jones*. Here Powell was not a litigating attorney, infrequently appeared in court, and showed a longer personal friendship with Holzer than did *Jones*, a fact which mitigated the discipline in *In re Rothenberg*, supra. Here, Petitioner did not lend money to Holzer as did *Jones*, but arranged for collateral to be posted for a bank loan which Holzer did pay off.

Here, Petitioner's misconduct occurred in 1979, not only prior to the formal adoption of Rule Rule 7-110 (a), but by several years the misconduct involved in the *Corboy* and *Jones* cases who were exonerated under the Rule.

C. Due Process was denied to Petitioner because he was disciplined by the state supreme court for infraction of a disciplinary rule, whose meaning was vague and debatable where the court excused other lawyers for similar infractions on the ground that the court had not theretofore issued a "settled opinion" interpreting the Rule.

In *Cohen* v. *Hurley*, 366 U.S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961) the court declared:

> The issue is not. of course, whether lawyers are entitled to due process of law in matters of this kind, but, rather, what process is constitutionally due them in such circumstances. We do not hold that lawyers, because of their special status in society, can therefore be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what State process is constitutionally due, *what distinctions are consistent with the right to equal protection* all depend upon the particular situation presented . . . (366 U.S. at 129) (Court's emphasis underlined; Petitioner's emphasis italicized).[8]

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[8] The result in *Cohen* was overturned in *Spevack*, 85 U.S. 511 supra.

In the posture of the instant case, the observations of Mr. Justice White concurring with the result in *In re Ruffalo,* 390 U.S. 544, supra, are pertinent:

> A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the roll can be deemed to have been *on notice* that the courts would condemn the conduct for which he was removed. . . (390 U.S. at 554) (Emphasis added).

Comparable to the Illinois Supreme Court's judicial notice of "considerable belief among members of the bar that they [the *Corboy* respondents] had acted properly" (*Corboy* at 45), Mr. Justice White noted the debatability of the ethics of the respondent in *Ruffalo*:

> Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes criminal offenses traditionally known as *malum in se.* It also includes conduct which all responsible attorney would recognize as improper for a member of the profession. (390 U.S. at 555).

Since a gift or a loan to a judge is not *per se* illegal or *malum in se*, the absence of guiding precedent by the state supreme court at the time of Petitioner Powell's alleged misconduct brings him within the ambit of the rule in *Ruffalo*, just as the Supreme Court tacitly exculpated the lawyer/respondents in *Corboy* and *Jones* for the reasons articulated by Mr. Justice White.

See *In re Inquiry Concerning a Judge* 357 So. 2d 172, 181 (Sp. Ct. Fla. 1978) holding that retroactive application of a disciplinary rule violates both procedural and substantive due process, as well as being "unfair".

The Illinois court in *Corboy*, and subsequent cases applying Rule 7-110(a), has posited an irrational and untenable distinction as to the irrelevance of motive or state of mind as a factor in determining a violation, while holding that motive or state of mind is material or relevant to the quantum of discipline. The

flawed reasoning of the Illinois court has resulted in an anomaly: Rule 7-110(a) is *ipso facto* breached if a loan or a gift is made to a judge irrespective of the accompanying state of mind, but no discipline is imposed where an alleged good motive accompanies conduct which violates the rule. Even this dubious distinction was not consistently observed by the Illinois high court because it applied a shifting standard with respect to the "crazy quilt" of disciplines it imposed or excused under the Rule. The oxymoronic result in *Corboy* and *Jones* is exactly the same as if the offending lawyers had not offended the Rule at all. The result reached in those cases is contrary to the established proposition that motive may be a mitigating or aggravating factor, but it is never an absolving factor.

CONCLUSION

For all of the foregoing reasons Petitioner respectfully prays that this Court grant the PETITION FOR WRIT OF CERTIORARI.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket No. 65387-Agenda 9—November 1987.
In re NATHAN N. POWELL, Attorney, Respondent.

JUSTICE MILLER delivered the opinion of the court:

In June 1986, the Administrator of the Attorney Registration and Disciplinary Commission filed a complaint charging the respondent, Nathan N. Powell, with professional misconduct in connection with a loan that he helped procure for Judge Reginald J. Holzer. A panel of the Hearing Board found against respondent on five of the six charges of misconduct and recommended that he be disbarred. The respondent filed exceptions to the Hearing Board's report and recommendation. The Review Board concurred with the Hearing Board, and respondent filed exceptions with this court pursuant to Supreme Court Rule 753(e)(5) (107 Ill. 2d R. 753(e)(5)).

Respondent was licensed to practice law in this State in 1934, and is now 77 years old. At the time of the loan in question, respondent had known Holzer casually for approximately 18 years. The two men belonged to the same lodge and would occasionally see one another at various functions. Respondent testified, however, that he and Holzer were not personal friends.

In 1978, respondent was retained by Harry Wohl to defend a suit that had been brought against Wohl for an accounting and damages. The lawsuit (Nelson v. Wohl (Cook Co. Cir. Ct.), No. 78—CH—8350) was assigned to Judge Holzer. On December 22, 1978, respondent entered his appearance for Wohl and also filed an answer and counterclaim. On March 2, 1979, the plaintiff, Nelson, moved for a disbursement of funds allegedly due from Wohl. The motion was set by Holzer for hearing on March 12, 1979.

On March 5, one week prior to the scheduled hearing, Holzer telephoned the respondent and asked him to come to Holzer's chambers. Upon respondent's arrival, Holzer appeared agitated and asked respondent if he was still representing a bank.

Respondent replied that he was. Holzer then explained that he was overdrawn at his own bank and needed a $10,000 loan. When respondent asked the judge whether he had collateral, Holzer replied that he did not. Respondent then told Holzer that without collateral there was nothing respondent could do. Holzer told respondent that he was in desperate need of money and that respondent had to help him obtain a loan. Again respondent replied that he did not think he could help with a loan unless the judge had collateral. After further pressure from Holzer, respondent said he would see what he could do.

Respondent left Holzer's chambers and returned to his own office, where he considered Holzer's request. Respondent testified that when he left for home that evening he was still undecided on how to handle the situation. Later that evening, respondent concluded he did not have sufficient funds of his own to pledge as collateral for a loan to Holzer. Respondent then contacted his client, Harry Wohl, whose case was pending before Holzer, and arranged to meet with Wohl the next morning. At their meeting on the morning of March 6, 1979, respondent asked Wohl if Wohl could post a certificate of deposit as collateral for a $10,000 loan for Holzer at Lincoln National Bank. Wohl assented to this request, saying: "Nate, I'll do anything you ask me to do."

Respondent then contacted Robert Maram, a Lincoln National Bank loan officer, to arrange the loan for Judge Holzer. Respondent next telephoned Holzer and told him to see Maram about the loan. Respondent testified that he told Holzer that the loan had collateral but that he did not say who provided it. On March 9, 1979, the collateral having been posted, the loan for $10,000 to Holzer was completed. Four days later, on March 13, 1979, Holzer ruled in Wohl's favor and denied Nelson's motion for disbursement of funds. Respondent informed neither his opponents, nor Paul Flaherty, his co-counsel, of the transaction. The case was ultimately settled by agreement of the parties.

The Administrator filed a complaint against respondent, alleging that respondent had engaged in professional misconduct by arranging for his client to post collateral for a loan to Holzer, before whom respondent and his client had a pending case. The complaint charged that respondent's actions had violated Disciplinary Rule (DR) 7—110(A) (giving or lending a thing of

value to a judge); DR 1—102(A)(2) (circumventing a disciplinary rule through the actions of others); DR 1—102(A)(3) (engaging in illegal conduct involving moral turpitude); DR 1—102(A)(5) (engaging in conduct that is prejudicial to the administration of justice); DR 1—103(A) (failing to report knowledge of a violation of DR 1—102(A)); and Canon 9 (failing to avoid the appearance of professional impropriety). Illinois Code of Professional Responsibility (rev. 1977) (hereinafter the Code).

At the hearing, there was no dispute as to respondent's involvement in the loan to Holzer or the circumstances surrounding the transaction. The Administrator and respondent, however, disagreed on respondent's motive in arranging the loan and on respondent's knowledge of the impropriety of his actions.

Before the hearing panel, respondent contended that he was motivated by sympathy for Holzer and that he had no thought of influencing the judge. Respondent testified that he had always considered Holzer to be a good judge and a gentleman. Respondent further stated that Holzer's demeanor had affected him and that he felt sorry for the judge and his family. Moreover, respondent claimed that, when deciding to help Holzer, he gave no thought to any consequence that refusing Holzer's request might have on the case then pending before the judge.

Other portions of respondent's testimony, however, were inconsistent with respondent's assertion of charitable motives and his claim that before arranging the loan he gave no consideration to the effect refusing Holzer might have on the pending case. Respondent testified that he resented Holzer's asking him for help since the two men were not particularly close. Respondent said that he felt victimized by Holzer's request, and, when asked to explain what he meant, respondent answered:

> "I meant to the extent that I thought that I had a good case for Mr. Wohl. It was Mr. Wohl that was going to suffer. Maybe he was going to be made a victim through me; that the judge could have felt that this was something that I should have done for him. I didn't do it and now I'm going to show you."

Respondent's testimony from Holzer's trial was admitted into evidence and contained a similar explanation for respondent's decision to help Holzer. At Holzer's trial, respondent stated:

> "Well, as I best recall my mental processes at the time, I had two concerns. I think the foremost concern that I had is, could I help the Judge. Was there anything that I could do to help him. And, of course, the other was, well, if I didn't, would that in any manner at all have any effect upon the proceedings that were pending before him."

In addition to respondent's inconsistent testimony concerning his motives, there was also conflicting evidence concerning respondent's awareness of the prohibition against gifts and loans to judges. Respondent testified that it never occurred to him that his assistance to Holzer was unethical or that it violated any code of professional conduct. However, respondent also testified that when Holzer asked for his help he felt victimized because he could not rationalize what he was doing with the fact he had a case pending before Holzer. Moreover, at Holzer's trial, respondent explained that he decided against telling co-counsel, Paul Flaherty, about the transaction because he knew Flaherty to be a man of good character and he feared Flaherty would withdraw from the case if he learned of the loan to Holzer.

Based on the evidence presented, the Hearing Board found against respondent on five of the six charges brought by the Administrator. The Hearing Board believed that respondent's testimony that he felt victimized by Holzer's request indicated that he knew that his conduct was in violation of the Code. The Hearing Board also found that respondent had arranged the loan, in part, because he was concerned about the effect the failure to do so would have on the pending case. The Board further found that respondent had attempted to "curry favor with the Judge for himself and his client." The Board then concluded that respondent had circumvented a disciplinary rule through another's actions in violation of DR 1—102(A)(2); engaged in conduct prejudicial to the administration of justice in violation of DR 1—102(A)(5); engaged in illegal conduct involving moral turpitude in violation of DR 1—102(A)(3); failed to report knowledge of a violation of DR 1—102 in violation of DR 1—

103(A); and failed to avoid even the appearance of impropriety in violation of Canon 9. The Hearing Board, however, did not find that respondent had given or lent a thing of value to a judge in violation of DR 7—110(A). The Board then recommended that respondent be disbarred.

The Review Board concurred in the Hearing Board's report and recommendation and found that misconduct was shown by clear and convincing evidence. The Review Board, in reciting the Hearing Board's decision, mistakenly stated that respondent had been found guilty of violating DR 7—110(A). The Review Board stated: "Respondent's actions were calculated, wrong and cancerous to our system of justice. They resulted in the outright purchase of a judicial ruling. Akin to Esau before him he sold his professional birthright for a bowl of Judge Holzer's gruel. His conduct is shocking and we concur in the recommendation of the Hearing Panel that Respondent be disbarred." One member of the Review Board agreed with the finding of misconduct, but felt that respondent should be suspended for three years. Respondent filed exceptions to the Review Board's report, and before this court contests both the finding of professional misconduct and the recommended discipline.

Initially, respondent asserts that his conduct did not constitute a violation of DR 1—102(A)(2), which prohibits circumventing a disciplinary rule through the actions of others. Respondent acknowledges that the rule he was found to have circumvented through another's actions is DR 7—110(A) (giving or lending a thing of value to a judge). Respondent does not dispute that while he had a case pending before Holzer he asked his client to post the collateral necessary to secure a $10,000 loan for the judge. Respondent claims, however, to have acted out of compassion for Holzer and not out of corrupt or dishonest motives. Respondent therefore urges us to read a corrupt intent requirement into DR 7—110(A) and thereby indirectly into the rule against its circumvention, DR 1--102(A)(2).

Respondent suggests two reasons why we should require the existence of a corrupt mental state for a violation of DR 7—110(A).

First, respondent argues that unless DR 7—110(A) is interpreted to include a corrupt intent requirement, it violates the equal protection clauses of both the Federal and Illinois Constitutions (U.S. Const., amend. XIV: Ill. Const. 1970, art. I, §2). Respondent contends that, because the rule prohibits personal gifts or loans to judges but contains an exception for contributions to judges' campaign funds, DR 7—110(A) discriminates against the class of attorneys who make personal gifts or loans to judges with no intent to influence the judges' decisions. Respondent argues that while attorneys in this class may be sanctioned for making such gifts or loans, attorneys who make contributions to judges' campaign funds are not similarly subject to disciplinary action. Respondent asserts that there is no reasoned basis for the different treatment of the two classes of attorneys, since both personal gifts and campaign contributions are capable of influencing the conduct of a judge. Respondent concludes that only by reading a corrupt intent requirement into the rule can the campaign contribution exception be justified, and the alleged constitutional infirmity cured.

Second, respondent argues that the purpose of DR 7—110(A) favors an interpretation of the rule which includes a requirement of a corrupt mental state. Respondent asserts that the purpose of DR 7—110(A) is to preserve the fairness and impartiality of the court and to prevent the purchase of judicial rulings. Respondent reasons that because of the rule's purpose, only those gifts or loans given or made with an intent to influence a judge's decisions should be prohibited.

Before examining respondent's arguments in favor of interpreting DR 7—110(A) to include a mental state requirement, we observe that such an interpretation would not affect the result in this case. The Hearing Board panel found that in arranging the loan for Holzer "respondent was attempting to curry favor with the Judge for himself and his client." Respondent testified twice, once at Holzer's trial and once at his own disciplinary hearing, that he arranged the loan, in part, because he feared that the failure to do so would adversely affect the case then pending before Holzer. While respondent also testified that he was acting out of compassion for Holzer, the panel rejected this explanation for respondent's conduct. Because the panel was

better able to observe respondent's demeanor, judge his credibility and evaluate his conflicting testimony, and the record supports the finding, we accept the panel's finding on respondent's mental state. (See *In re Wigoda* (1979), 77 Ill. 2d 154, 158.) Therefore, under any analysis of DR 7—110(A), we conclude that respondent circumvented the rule's prohibition against gifts or loans to judges by having his client lend Holzer the collateral to secure a $10,000 loan.

Because respondent's actions in arranging the loan for Holzer were calculated to have an effect on the case pending before the judge, we conclude respondent lacks standing to raise his constitutional claim. To raise an equal protection argument, the party must be a member of the class against whom the rule allegedly discriminates. (See *People v. Tosch* (1986), 114 Ill. 2d 474, 482.) Respondent, however, does not belong to the group which he contends DR 7—110(A) discriminates against, namely those attorneys who make personal gifts to judges with no improper motive. Because respondent has no standing to raise the constitutional claim, we have no reason to address the argument.

We turn next to respondent's second mental state argument in which he asserts that the purpose behind DR 7-110(A) indicates that only gifts or loans designed to influence a judge should be prohibited. In *In re Corboy* (1988), 124 Ill. 2d 29, 38, we rejected this argument, explaining that the prohibition against gifts of loans to judges "is designed not only to forestall lawyers from seeking to exercise improper influence over the judiciary, but also to eliminate even the appearance of improper influence." In *Corboy,* we concluded that an attorney's motives in making a gift or loan to a judge are irrelevant in determining whether he is guilty of misconduct since "even if well-intended [the gifts or loans] are simply too susceptible to abuse and too prone to creating an appearance of impropriety." *Corboy,* 124 Ill. 2d at 39). We adhere to that position here and reject respondent's contention that the sole purpose of the rule is to prohibit only those gifts or loans intended to influence a judge.

Respondent also challenges the Hearing and Review Boards' conclusion that he violated DR 1—102(A)(5) by engaging in conduct prejudicial to the administration of justice. Respondent

contends that, because his client deserved to win on the merits, the posting of collateral for Holzer's loan was not "prejudicial to the administration of justice." We refuse to read this phrase so narrowly. The administration of justice requires a fair and impartial tribunal. When a party or his attorney performs favors for a judge before whom the attorney or his client is likely to appear, the fairness and impartiality of the tribunal is compromised and the administration of justice is prejudiced. Further, when an attorney arranges for his client to secure a loan for a judge before whom the attorney and his client have a case pending, the appearance of impropriety is compounded and the administration of justice is prejudiced. Because respondent's conduct was prejudicial to the administration of justice, we find that he violated DR 1—102(A)(5).

Respondent next challenges the Boards' conclusion that he violated DR 1—102(A)(3) by engaging in illegal conduct involving moral turpitude. Respondent argues that his conduct was not illegal and claims that the report of the hearing panel failed to specify how his conduct was unlawful.

Our examination of the record reveals that the complaint filed against the respondent failed to specify which law or laws respondent is charged with having violated. To be illegal the conduct charged must be in violation of some law in the jurisdiction in which the conduct occurred. Further, the complaint does not identify the conduct of respondent that was unlawful. Before the Hearing Board panel, the Administrator contended that respondents' actions involved moral turpitude; however, the Administrator made no argument that respondent's conduct was illegal. Further, the Administrator, in both his brief to this court and at oral argument, failed to answer respondent's claim that no showing had been made that his conduct was illegal. While we express no opinion on the legality or illegality of respondent's conduct we do conclude that an essential element of the charge that an attorney violated DR 1-102(A)(3) is that the conduct be illegal. Because the Administrator has not specified either in the complaint, at the hearing, or before this court which law or laws respondent's actions may have violated, we will not speculate on the illegality here. We, therefore, dismiss that portion of the complaint that charges respondent with a violation of DR 1-102(A)(3).

Additionally, respondent argues that he is not guilty of violating DR 1-103(A). At the time of respondent's misconduct, DR 1-103(A) required a lawyer who possessed unprivileged knowledge of violation of DR 1-102 to report such knowledge to a tribunal or other authority empowered to investigate or act on the violation. The Administrator has not identified in his complaint the person whose violation of DR 1-102 the respondent had a duty to report. Moreover, the Administrator did not argue before the hearing panel or this court that respondent violated DR 1-103(A). We note parenthetically that respondent in his brief to this court assumed that it was his own misconduct that he is charged with not having reported. The Administrator has not responded to the assumption. Because the Administrator has not alleged in either the complaint, before the hearing panel or here whose misconduct respondent should have reported pursuant to DR 1-103(A), we decline to consider this charge.

Respondent next argues that it was improper to find that he had violated Canon 9, which states "[a] lawyer should avoid even the appearance of impropriety." Respondent points out that the Canons of Ethics are not disciplinary rules and that commentators and courts have either rejected or seriously questioned the use of Canon 9 as an independent basis for discipline. See, *e.g.*, Annotated Code of Professional Responsibility Canon 9, at 398-99 (American Bar Foundation 1979); ABA Committee on Ethics and Professional Responsibility, Formal Op. 342 (1975); see also *International Electronics Corp. v. Flanzer* (2d Cir. 1975), 527 F.2d 1288, 1295.

We believe that Canon 9 is not a standard of discipline in itself by expresses that policy considerations underlying the disciplinary rules contained within Canon 9. While respondent's conduct was not only improper but also created the appearance of impropriety, we nevertheless conclude that Canon 9 does not afford a basis for imposing sanctions independent of an allegation and proof of a violation of one of the disciplinary rules contained within the canon.

Finally, respondent argues that the recommended sanction of disbarment is unduly harsh. While this court strives for uniformity in attorney discipline *(In re Saladino* (1978), 71 Ill. 2d 263, 275: *In re Andros* (1976), 64 Ill. 2d 419, 425), we recognize

that each case is unique and must be decided on its own specific facts (*In re Mason* (1988), 122 Ill. 2d 163, 170). In determining the appropriate sanction, this court necessarily considers all of the aggravating and mitigating circumstances relevant to the case.

Respondent asks that we consider his mental state as a mitigating factor when determining the discipline to be imposed. Again, respondent claims that he had no corrupt motive in arranging the loan for Holzer, and that he did not realize the transaction was improper. We acknowledge that respondent's mental state is an appropriate factor to consider in deciding the nature and severity of the sanction. (*In re Ketchum* (1988), 124 Ill. 2d 50, 57-58; *In re Clayter* (1980), 78 Ill. 2d 276, 283.) Because the record in this case supports the Hearing Board's findings that respondent's motive in arranging the loan was to influence Holzer's decision in the case pending before him, and that respondent knew his conduct was unethical, respondent's mental state cannot be considered in mitigation.

Respondent also points to the "staleness" of the charge and his long, otherwise unblemished career as mitigating factors. Because the Administrator's delay in filing the complaint was due to the concealment of the violation, we do not consider the "staleness" of the charge to be a mitigating circumstance. Further, while the court has in the past considered the length of time an attorney has practiced and the lack of previous misconduct in determining an appropriate sanction *In re Williams* (1986), 111 Ill. 2d 105, 117; *In re Lenz* (1985), 108 Ill. 2d 445, 453), we have also held that where an ethical violation is of a sufficiently serious character, such as that considered here, a single act of misconduct may warrant disbarment (see *In re Rosenthal* (1978), 73 Ill. 2d 46). We note in mitigation that respondent offered the testimony of eight character witnesses who attested to respondent's reputation for honesty and integrity.

In aggravation, we repeat that the Hearing Board found, and we agree, that respondent's motive in arranging the loan for Holzer was to curry favor with the judge. Thus, respondent's case differs significantly from the cases consolidated in *In re Corboy* (1988), 124 Ill. 2d 29, in which there were no findings of intent to influence a judge. *Corboy*, 124 Ill. 2d at 39, 48, 49.

Respondent further argues that the validity of the Board's finding on his motive is questionable in light of the Board's conclusion that he did not violate DR 7-110(A) (giving or lending a thing of value to a judge). We believe that the Hearing Board's finding that respondent did not violate DR 7-110(A) signifies only that the Board concluded that respndent's actions in arranging the loan and using his client to post the collateral were sufficiently indirect to constitute a violation of the circumvention rule rather than a direct violation of DR 7-110(A). In either event, we consider that respondent's actions in arranging the loan for Holzer constituted the giving of a thing of value to a judge, and that respondent's conduct also violated DR 7-110(A). See *In re Ketchum* (1988), 124 Ill. 2d 50, 60.

Respondent's misconduct was further aggravated by the fact that respondent, who knew that Holzer was asking him to do something improper, decided to comply with the judge's request only after thinking about it for some time. The arrangements for the loan extended over a period of several days, during which time respondent had ample opportunity to reconsider his decision. Thus, respondent's misconduct was not a "quick and unreasoned failure of judgment, but rather was a deliberate course of conduct." *In re Thebeau* (1986), 111 Ill. 2d 251, 256. *Cf. In re Karzov* (December 15, 1988), No. 65947 (attorney suspended for 18 months after going to bank, withdrawing money, and delivering it to Holzer all on the same afternoon he was asked to do so by the judge).

We also note in aggravation that, at the time of the misconduct, respondent and his client had a case pending before Holzer. Further, the loan was arranged during the week immediately prior to Holzer's ruling on an important motion in the case. We do not suggest that this factor is a prerequisite for finding a violation of the rule prohibiting gifts or loans to judges or the rule against its circumvention. The presence of a pending case is, however, an aggravating factor that may be taken into consideration in determining an appropriate sanction.

Finally, respondent's misconduct was aggravated by respondent's having involved his own client in the unethical scheme. We find it disturbing that respondent chose to violate disciplinary rules by utilizing in the scheme the person whose interests he was ethically bound to protect.

Because of the serious nature of the ethical violations committed by respondent, as well as the circumstances surrounding their commission, we conclude that the appropriate sanction is disbarment.

Respondent disbarred.

JUSTICE STAMOS took no part in the consideration or decision of this case.

APPENDIX B

ILLINOIS SUPREME COURT
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January 30, 1989

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No. 65387 - In re: Nathan Norton Powell. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Stamos and Calvo, JJ., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on February 9, 1989.

APPENDIX C

No. 65387

IN THE

SUPREME COURT OF ILLINOIS

In re:

Nathan Norton Powell — Disciplinary Commission
DC86CH157

ORDER

This matter has come for consideration upon the motion of Nathan Norton Powell, appellant, to stay the mandate of this court pending appeal or application of *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this court shall, upon proof of such filing being made by affidavit filed with the clerk of this court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ WILLIAM G. CLARK

Justice, Supreme Court of Illinois

FILED

Dated: FEB-7 1989

CHICAGO
SUPREME COURT CLERK

Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATHAN N. POWELL,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether Petitioner's disbarment for having a client post a $10,000 certificate of deposit as collateral for a loan to a judge violated the due process or equal protection clauses of the fourteenth amendmant to the United States Constitution.

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No. 88-1800

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NATHAN N. POWELL,

Petitioner,

vs.

ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution
Amendment XIV, Section 1:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION INVOLVED

Illinois Code of Professional Responsibility, Rule 7-110(a). Relationship With Officials (1980).

A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Illinois Code of Professional Responsibility, Rule 7-110(a). Relationship With Officials (Amended 1988).

A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(c)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Illinois Code of Judicial Conduct, Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its

regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

Supreme Court Rule 771. Types of Discipline

Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline of attorneys may be:

(a) disbarment;
(b) disbarment on consent;
(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of

the court with probation; or

(g) censure.

INTRODUCTION

For the sake of brevity, Respondent will not include provisions in this brief for the opinion below, jurisdiction, and statement of the case. Respondent will address in the argument section those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, in disciplining Petitioner, the Supreme Court of Illinois did not violate the equal protection clause. Even if the Court had adopted Petitioner's proposed interpretation of Rule 7-110(a) of the Illinois Code of Professional Responsibility, such an interpretation would not have affected the result the state court reached in Petitioner's disciplinary proceeding.

Second, Petitioner was not denied due process of law during the

course of the disciplinary proceeding against him. Petitioner received notice of the charge and an opportunity to defend in complete conformance with due process requirements mandated by In re Ruffalo, 390 U.S. 544 (1968).

Third, the amount of discipline imposed upon Petitioner is within the discretion of the Supreme Court of Illinois. Such flexibility is crucial to achieve the ultimate goals of the disciplinary system. The only issue in fact raised by this petition is an issue of state law, which the Supreme Court of Illinois has already decided.

ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied because Petitioner was accorded due process and equal protection of the laws during his disbarment proceeding. Lawyer discipline is within the inherent authority of the state courts. See, Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-793 (1975). Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of Illinois. See, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282, 1284 (1980).

Petitioner was disbarred for having a client post a $10,000 certificate of deposit as

collateral for a loan to a judge before whom Petitioner and the client had a pending case. The Supreme Court of Illinois found that Petitioner circumvented a disciplinary rule through the actions of another in violation of Rule 1-102(a)(2); gave or lent a thing of value to a judge in violation of Rule 7-110(a); and engaged in conduct prejudicial to the administration of justice in violation of Rule 1-102(a)(5).

In selecting the amount of discipline to be imposed upon an attorney the Supreme Court of Illinois balances the need to be consistent with a consideration of the unique facts of the particular case. See, In re Saladino, 71 Ill.2d 263, 375 N.E.2d 102 (1978).

Based on the unique facts of this case, including the specific finding that Petitioner intended to curry favor with the judge, the deliberate nature of Petitioner's course of conduct, and Petitioner's involvement of his own client in an unethical scheme, the Supreme Court of Illinois concluded that disbarment was the appropriate sanction.

Petitioner argues that his disbarment violates the equal protection clause because Rule 7-110(a) prohibits gifts or loans to judges yet allows contributions to campaign funds. Petitioner argues that this classification is irrational and can only be cured by interpreting the rule in such a way as to take into account the mental

state or purpose accompanying a gift or a loan to a judge.

The Supreme Court of Illinois correctly concluded that such an interpretation would not affect the result in Petitioner's case. The court adopted the Hearing Board's finding that Petitioner was attempting to curry favor with the judge. Petitioner testified that he arranged the loan, in part, because he feared that the failure to do so would adversely affect the case then pending before the judge.

The Supreme Court of Illinois held that Petitioner did not belong to the group which he contended Rule 7-110(a) discriminates against, namely those attorneys who make personal gifts to judges with no improper motive. The court

noted that in order to raise an equal protection argument, the party must be a member of the class against whom the rule allegedly discriminates. People v. Tosch, 114 Ill.2d 474, 482, 501 N.E.2d 1253, 1256 (1986), cert. denied, 483 U.S. 1008 (1987).

Because Petitioner's actions were calculated to have an effect on the case pending before the judge, the Supreme Court of Illinois correctly concluded that Petitioner lacked standing to raise his equal protection claim.

Petitioner also argues that his disbarment violates equal protection and due process because Petitioner arranged the loan for the judge before the Supreme Court of Illinois formally adopted Rule

7-110(a); because the meaning of Rule 7-110(a) was vague and debatable before the court decided In re Corboy, et al., 124 Ill.2d 29, 528 N.E.2d 694 (1988); and because Petitioner did not receive the same disciplinary sanction imposed upon other Illinois attorneys who violated Rule 7-110(a).[1]

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[1] It is to be noted that although Petitioner raised an equal protection claim before the Supreme Court of Illinois, he did not raise a due process claim.

Petitioner asserts that his disbarment violates due process because the meaning of Rule 7-110(a) was vague and debatable at the time Petitioner engaged in the misconduct. Petitioner's argument is meritless. In this case, Petitioner's actions were wrong under the prior disciplinary rule and wrong under the rule as later amended by the state court in In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988). The Supreme Court of Illinois correctly concluded that Petitioner violated Rule 7-110(a) under any analysis of the rule. In re Powell, 126 Ill.2d 15, 26, 31, 533 N.E.2d 831, 835, 837 (1988). Rule 7-110(a) provided Petitioner with more than fair warning that he could not engage in such activity.

Although Petitioner arranged the loan for the judge before the Supreme Court of Illinois formally adopted Rule 7-110(a), Petitioner concedes that prior to the adoption of the Code of Professional Responsibility, the court had in numerous opinions referred to the Illinois State Bar Association Ethics Code as a safe guide in reviewing lawyer conduct. (Petition at 5, n.4). See, In re Samuels, 126 Ill.2d 509, 524, 535 N.E.2d 808, 814 (1989). Petitioner, a lawyer of long standing, knew or should have known that loans to judges were unethical. The Supreme Court of Illinois noted that when the judge asked for his help Petitioner felt victimized because he could not

reconcile what he was doing with the fact that he had a case pending before the judge. At the judge's criminal trial for extortion Petitioner testified that he decided not to tell his co-counsel, Paul Flaherty, about the loan because he knew Flaherty to be a man of good character and he feared Flaherty would withdraw from the case if Flaherty learned of the loan to the judge. Powell, 126 Ill.2d at 23, 533 N.E.2d at 833.

Petitioner was accorded due process in the formal disciplinary proceeding. In In re Ruffalo, 390 U.S. 544 (1968), this Court stated due process requires that an attorney in a disciplinary proceeding receive notice of the charge and an opportunity to be

heard. Id. at 550. Both requirements were met in the instant case. Petitioner had notice that he was charged with arranging a proscribed loan to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner. Petitioner was represented by counsel at hearing and on appeal.

Petitioner's basic underlying grievance is that he did not receive the same disciplinary sanction as certain other Illinois attorneys who violated the same disciplinary rule. In In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988) and In re Jones, 125 Ill.2d 371, 532 N.E.2d 239 (1988), a total of seven lawyers were found to have violated amended Rule

7-110(a). The Court declined, however, to impose sanctions upon them due to the unique facts surrounding their financial transactions as well as other mitigating factors. In other cases considering Rule 7-110(a) the court suspended or disbarred Illinois attorneys for violations of Rule 7-110(a). See, e.g., In re Karzov, 126 Ill.2d 33, 533 N.E.2d 856 (1988) (eighteen month suspension), petition for cert. filed (No. 88-1740); In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1140 (1988)(two year) suspension); In re Heller, 126 Ill.2d 94, 533 N.E.2d 824 (1988)(disbarment); In re Rothenberg, 127 Ill.2d 139, 535

N.E.2d 849 (1989)(one year suspension); In re D'Angelo, 126 Ill.2d 45, 533 N.E.2d 861 (1988)(disbarment); In re Green, No. 65942, slip op. (Ill. Oct. 20, 1988)(disbarment)(opinion vacated after Green's death but prior to the issuance of the mandate); In re Lane, 127 Ill.2d 90, 535 N.E.2d 866 (1989)(one year suspension); In re Lidov, No. 67978, slip op. (Ill. May 17, 1989)(six month suspension).

The Illinois court was not required to make Petitioner's sanction identical with others who were found to have violated the same disciplinary rule. Final responsibility for determining discipline to be imposed on attorneys rests in the Supreme

Court of Illinois. In determining the appropriate penalty, the Court may properly consider all facts and circumstances in aggravation and mitigation, including the attorney's actual conduct. See, In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980). Furthermore, this Court has rejected the notion that there is a constitutional right of proportionality of sanctions, even in criminal proceedings. See, e.g., Pulley v. Harris, 465 U.S. 37 (1984). Even if it could be argued that a criminal defendant were entitled to this type of proportionality, the concept should not apply to an attorney disciplinary proceeding. A disciplinary proceeding is simply not criminal in nature. In re

Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434 U.S. 829 (1977). C.f., In re Ruffalo, 390 U.S. 544 (1968)(disciplinary proceedings, although sui generis, described as quasi-criminal).

Flexibility in imposing sanctions is neither arbitrary nor unconstitutional but necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice. See, Middlesex County Ethics Committee, et. al. v. Garden State Bar Association, et. al., 457 U.S. 423, 434-35 (1982). To achieve fair results, the disciplinary system must be neither rigid nor mechanistic, but flexible enough to

allow for the uniqueness of each case. See, In re Leonard, 64 Ill.2d 398, 406, 356 N.E.2d 62, 66 (1976). The court must evaluate each situation independently because the circumstances of each case vary substantially. Sanctions which are appropriate in one situation may be inappropriate in another even though the underlying offense is similar or even the same. See, In re O'Hallaren, 64 Ill.2d 426, 433, 356 N.E.2d 520, 523 (1976). The Illinois court correctly applied these principles in deciding the proper sanction for Petitioner.

Finally, Illinois Supreme Court Rule 771 provided Petitoner with sufficient notice that the state court had the authority to impose

discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. Thus the issue of appropriate sanction as raised by Petitioner is a matter of state law. No substantial federal questions exist.

In summary, the due process and equal protection clauses of the United States Constitution do not require a more exacting standard than that employed by the Supreme Court of Illinois. Further, disparate sentencing is not a proper basis for certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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